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No. 25

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

FREDERICK T. ZUBER, ET AL., *Petitioners*,

v.

RUSSELL ALLEN, ET AL., *Respondents*.

BRIEF *AMICUS CURIAE* OF ATTORNEY GENERAL OF THE STATE OF CONNECTICUT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF FREDERICK T. ZUBER, ET AL.

ROBERT K. KILLIAN
Attorney General of the
State of Connecticut
30 Trinity Street
Hartford, Connecticut

MICHAEL J. SCANLON
Assistant Attorney General of the
State of Connecticut

Amicus Curiae

INDEX

	Page
Interest of the *Amicus Curiae*	2
Reasons for Granting the Writ	5
1. The case raises important questions as to Congressional intent directly and significantly affecting large numbers of dairy farmers in the southern New England area	5
2. If the decision below is not reviewed by this court, the Secretary may be forced to abandon the Connecticut differential regardless of the outcome of *Cranston* v. *Freeman*	10
3. The decision of the United States District Court for the Northern District of New York in *Cranston* v. *Freeman* demonstrates in detail the fundamentally erroneous nature of the construction of the statute reflected in the *Zuber* v. *Allen* opinion and thus the appropriateness of review by this	12
Conclusion	16

CITATIONS

Cases:

Cranston v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y., 1968), appeal docketed, Nos. 32,793-99, C.A.2, October 28, 1968	3, 4, 5,7, 10, 12-16
Green Valley Creamery, Inc. v. *United States*, 108 F.2d 342 (1st Cir., 1939)	9
Lehigh Valley Cooperative Farmers, Inc. v. *United States*, 370 U.S. 76 (1962)	14
Queensboro Farms Products v. *Wickard*, 137 F.2d 969 (2nd Cir., 1943)	7
United States v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533 (1939)	9

Page

STATUTES AND REGULATIONS:

Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. § 601, *et seq.*

Sec. 1, 7 U.S.C. § 601 8
Sec. 2, 7 U.S.C. § 602 ..... 8, 11
Sec. 8c(5)(B), 7 U.S.C. § 608c(5)(B) 7, 14
Sec. 8c(11)(C), 7 U.S.C. § 608c(11)(C) 7
Sec. 8c(18), 7 U.S.C. § 608c(18) 11

Code of Federal Regulations

§ 7 C.F.R. 1001.72(a) (1968) 2
§ 7 C.F.R. 1015.72(a) (1968) 3

LEGISLATIVE REFERENCES:

79 Cong. Rec. 9602, June 18, 1935, Remarks of Representative Plumley 8

House of Representatives Report No. 1241 (74th Cong., 1st Sess.), June 15, 1935 ..... 7, 8

Senate Report No. 1011 (74th Cong., 1st Sess.), May 13 (Calendar day, July 3), 1935 ..... 7, 8

MISCELLANEOUS:

Affidavit of Herbert L. Forest, filed with the District Court on January 9, 1967, and transmitted to this Court as part of the original record 10

Connecticut Dairy Facts, monthly publication of the Connecticut Department of Agriculture and Natural Resources 2, 4

The Dairy Industry and the AAA, by John D. Black (The Brookings Institution, Publication No. 64 (1935)) 9

24 Federal Register 1049, 1063 3

33 Federal Register 12849, 12850 4

Page

Milk Price Handbook for Connecticut, published September, 1968, by Cooperative Extension Service of the College of Agriculture, University of Connecticut 4

Statement of Joseph N. Gill, Commissioner of Agriculture and Natural Resources, State of Connecticut, at Hearing on Proposed Amendments to Connecticut and other Northeastern Federal Orders, Beginning May 6, 1963, at Market Administrator's Office, 205 East 42nd Street, New York 17, New York 4

A Study of Fluid Milk Prices, by John M. Cassels, (Harvard Economic Studies, Vol. LIV; Harvard University Press; 1937) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 861

FREDERICK T. ZUBER, ET AL., *Petitioners,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA COURT

BRIEF *AMICUS CURIAE* OF ATTORNEY GENERAL OF THE STATE OF CONNECTICUT IN SUPPORT OF PETITION

The State of Connecticut, pursuant to Rule 42 of the Rules of this Court, urges that the petition of Frederick T. Zuber, et al., for a writ of certiorari be granted. The pertinent facts, the questions presented for review, and the jurisdictional requisites are set forth in the petition itself and are adopted herein. The opinions below and the relevant statutory and regulatory provisions are printed as an appendix to that petition.

INTEREST OF THE *AMICUS CURIAE*

Agriculture constitutes a substantial sector of the Connecticut economy, and dairy farming, in turn, occupies the leading position in that sector. In October, 1968, Connecticut's more than 1,200 dairy farmers[1] delivered virtually all of the milk produced by them for sale in the Federally regulated markets of Southern New England. Total 1968 production from the State's dairy farmers amounted to more than 680 million pounds of milk, with gross receipts from its sale approaching $46,000,000. The decision of the Court of Appeals below outlawing the Secretary's employment of price differentials which are received by Connecticut and other so-called "nearby" producers in milk marketing orders promulgated by him threatens to visit a substantial decline in price on Connecticut's many dairy farmers and thus a serious blow to the State's dairy economy.

One hundred thirty-five[2] Connecticut dairy farmers delivering their milk to handlers serving the Massachusetts-Rhode Island Milk Marketing Area are located in the "nearby" zone described in the Secretary's milk marketing order for that Area[3], and consequently receive the nearby differential at issue in the instant case. Most of the remainder of the State's producers, approximately 1,079 in number, deliver to handlers serving the Connecticut Milk Marketing Area and, under the Secretary's order for the Connecticut

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[1] Dairy farmers are referred to as "producers" or "milk producers" in the Act and the Secretary's regulations under it. The three terms will be used interchangeably in the course of this brief.

[2] The number of producers is for October, 1968. This and other data in this paragraph relating to the Connecticut dairy economy are based on information taken from *Connecticut Dairy Facts*, a monthly publication of the Connecticut Department of Agriculture and Natural Resources.

[3] See 7 C.F.R. § 1001.72(a); App. 11a-13a.

Area, receive a nearby differential analogous to that held illegal by the court below[4]. The Connecticut Order differential has been received by this latter group since the promulgation of the original Connecticut Milk Marketing Order in 1959 and reflects the correspondingly higher prices paid nearby producers for their milk prior to federal regulation of the Connecticut market.[5] The Connecticut differential was recently upheld in a well-considered opinion by the United States District Court for the Northern District of New York (Timbers, J., sitting by designation) in the case of *Cranston* v. *Freeman*, 290 F. Supp. 785 (1968), which is currently on appeal to the United States Court of Appeals for the Second Circuit.[6]

The broader repercussions of the holding of the court below on the agricultural economy of southern New England, and on the interrelationships between that economy and the overall economy of the area, are difficult to gauge with accuracy. Yet it is clear, at a minimum, that removal of the differentials from the New England orders will reduce prices to nearby farmers by significant amounts, and that the further result will undoubtedly be a marked acceleration in the number of producers leaving the market.[7] Because

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[4] See 7 C.F.R. § 1015.72(a). Substantial numbers of New York and Massachusetts producers are also located within the Connecticut order "nearby" zone.

[5] See 24 Fed. Reg. 1049, 1063 (1959), quoted in *Cranston* v. *Freeman*, 290 F. Supp. 785, 795 (N.D.N.Y., 1968), App. 90a-91a.

[6] Appeals in the case were docketed in the Court of Appeals on October 28, 1968, as Nos. 32,793-99.

[7] The decline in numbers of producers throughout the Northeastern portion of the country in recent years has prompted the Secretary to institute substantial Class I price increases in the Northeastern markets. In a recent administrative decision raising the Class I price in six Northeastern markets by $.24 per hundredweight, the Secretary in part explained his action in the following terms:

> "Producers continue to drop out of production in the Northeast Federal order markets at a rapid rate . . . there was a

the differential invalidated in *Zuber* v. *Allen* directly affects a large number of Connecticut dairy farmers, and, more importantly, because, absent review of the *Zuber* decision, the Secretary might terminate the Connecticut differential in the interests of stable and orderly marketing, regardless of the outcome of the *Cranston* case, the State of Connecticut is constrained to set forth in this brief the considerations which prompt it to support the petitioners in the present case.

> loss of about 6% in producer numbers in the last year. . . . This continued trend poses a very serious threat to the adequacy of a milk supply for consumers in the Northeast. . . . The continuing rise in production costs, the tight labor market and the alternative employment opportunities available to dairy farmers in the Northeast pose a serious threat to continuing adequacy of milk supplies in the region." 33 Fed. Reg. 12849, 12850.

Connecticut is no exception to this trend. Its total producer numbers have shrunk from a 1955 total of 3,689 to the current level of less than 1,300. See *Milk Price Handbook for Connecticut* (published September, 1968, by Cooperative Extension Service of the College of Agriculture, University of Connecticut), p. 22. The State's average monthly losses for the year ending October, 1968, numbered between 7 and 8 producers. See *Connecticut Dairy Facts*, November, 1967-November, 1968.

The social and economic tragedies inherent in such losses are suggested in testimony given by Connecticut Commissioner of Agriculture and Natural Resources Joseph N. Gill in 1963 at Federal hearings concerning Class I pricing in the Connecticut market:

> "Think of the bulk tanks for sale, the land lying idle or going into new uses, the people finding new jobs and a new way of life, the changes in tax base for our towns, the cows for sale, the machinery and buildings no longer needed, the effect on suppliers of feed and other inputs, and many other factors [which come into play when producers leave dairy farming]. . . ." (Statement at Hearing on Proposed Amendments to Connecticut and other Northeastern Federal Milk Orders, beginning May 6, 1963, at Market Administrator's Office, 205 East 42nd Street, New York 17, N. Y.)

REASONS FOR GRANTING THE WRIT

In ordering the elimination of the nearby differential provisions of the Massachusetts-Rhode Island Milk Marketing Order and thereby directing that the pooling provisions of the Order instead operate without regard either to economically legitimate customary pricing patterns or to equitable considerations, the court below has significantly misconstrued the Congressional purpose leading to enactment of the legislation in issue. Its treatment of the applicable statutory language contradicts the holdings of other courts, most recently that of the United States District Court for the Northern District of New York in the case of *Cranston* v. *Freeman*. Its reading of the statutory terminology disregards the Secretary's long continued administrative construction of the Act. Because the infirmities of the opinion below are apparent when it is considered against the background of the detailed discussion of legislative purpose, judicial precedent and administrative construction set forth in the *Cranston* opinion, and because the decision below may, if allowed to stand without review by this court, force abandonment of the Connecticut order's nearby differential regardless of the outcome of the *Cranston* case, this court should grant the petition of the affected nearby farmers.

1. *The case raises important questions as to Congressional intent directly and significantly affecting large number of dairy farmers in the southern New England area.*

The price adjustment provision challenged in the present litigation provides for payment, to many hundreds of dairy farmers whose farms are readily accessible to the large population centers of southern New England, of somewhat higher prices than accrue to dairy farmers located at

greater distances from those centers. Consistently with economic data drawn from periods preceding the institution of federal regulation in various parts of southern New England over the past three decades, this pricing provision allocates a portion of the total proceeds paid by handlers for milk received by them from producers in approximate conformity with pricing patterns long customary in the affected supply areas. The provision is desirable from an economic standpoint in that it helps to preserve in the market that core of producers who, for a variety of legitimate economic reasons, including greater accessibility, reliability, evenness of production, and other representative values contributed by them to the market, received greater returns than their distant counterparts prior to the commencement of federal regulation. It is as well cognizant of the equities inherent in the pre-regulation pricing relationships between generally higher cost "nearby" and generally lower cost "distant" producers. As the court below notes, the provision is "designed 'to reflect the fact that under competitive conditions' nearby producers got a higher price . . ."[8] Contrary, however, to the *Zuber* court's conclusions, it is the view of the State of Connecticut that the Secretary's decision to employ farm location differentials is altogether consonant with the Congressional purpose in enacting the statutory language in issue and with judicial and administrative construction of that language.

Circuit Judge Jerome Frank, a former general counsel to the Agricultural Adjustment Administration during the period immediately preceding passage of the legislation in issue in this case, has noted " . . . the plain intention of Congress to give the Secretary wide discretion in devising

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[8] App. 36a.

regional milk plans. . . .'"[9] The relevant Congressional Reports speak to the same effect,[10] and both those reports and the Act further stress the legislative intent that these plans take into account the particular characteristics of the individual markets to be regulated.[11] Even more directly to the point, the act authorizes the Secretary to utilize customary differential adjustments to the uniform prices paid producers,[12] thus granting him a discretionary authority with regard to producer prices which clearly allows reliance by him on market practices operative at the commencement of regulation.

The *Zuber* court has ignored these various indicia of Congressional intent with regard to the milk order legislation in issue. Instead, it has concluded that the Secretary's authority in regulating the fluid milk markets of the Nation is so circumscribed that he must disregard legitimate pricing patterns long common in the milk markets of the Northeastern United States. In the name of uniformity, it has ordered him to institute a pricing system which would create totally unexpected and unjustifiably high prices in areas of northern New England distant from the regu-

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[9] *Queensboro Farms Products* v. *Wickard*, 137 F.2d 969, at 980 (2nd Cir., 1943).

[10] H.R. Rep. No. 1241 74th Cong., 1st Sess. (1935), at 7 and 9, and S. Rep. No. 1011, 74th Cong. 1st Sess. (1935), at 9; and see excerpts quoted in *Cranston* v. *Freeman*, App. 94a-96a.

[11] See Id. and 7 U.S.C. § 608c (11)(C) ("All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas").

[12] See 7 U.S.C. § 608c(5) (B), App. 3a-4a (". . . subject . . . to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order . . .").

lated markets and correspondingly unnatural lower prices in the nearby zones. In doing so, the court has read the statute in a way utterly foreign to the construction which has long had the approval of the Secretary, the courts, and those parties affected by the regulation. This reading should not stand without full review by this court.

Congress, in enacting the statute in issue, was concerned with the well-being of this country's farming population.[13] It was, moreover, concerned with the attainment of orderly and stable milk marketing. It hoped to achieve this result by the use of "methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present section 8(3) of the Agricultural Adjustment Act."[14] "The plans for selling milk . . ." set forth in the statute, the House of Representatives was told in 1935, by a member of that body from Vermont, were those which had ". . . been developed over a period of the last 20 years . . ."[15]

The payment of higher prices to nearby producers in unregulated markets and as a part of cooperative association producer payment plans was at the time of passage

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[13] See 7 U.S.C. § 601, declaring ". . . that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce", and 7 U.S.C. § 602, setting forth the policy of Congress through the Secretary ". . . to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices. . . ."

[14] H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935), p. 9; S. Rep. No. 1011, 75th Cong., 1st Sess. (1935), p. 9.

[15] 79 Cong. Rec. 9602; June 18, 1935, Remarks of Rep. Plumley.

of the Act a phenomenon of which dairy economists, dairy industry personnel, and farmers were well aware.[16] Given the Congress' express intention that the practices and methods evolved prior to enactment of the statutory language here in question be employed where determined by the Secretary to be appropriate, it is far from surprising that the Secretary has for decades utilized nearby differentials in the Northeastern markets. To have done otherwise would have been to ignore the economics of the market-place and equity as among the farmers in the affected markets. His action hardly calls for judicial censure at this late date, after three decades of widespread use of such differentials in milk marketing orders.

Most certainly it is with many of the foregoing considerations relating to congressional intent in mind that this court in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, at 567 (1939), and the United States Court of Appeals for the First Circuit, in *Green Valley Creamery, Inc.* v. *United States*, 108 F2d 342, at 346

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[16] See, e.g., Cassels, *A Study of Fluid Milk Prices*, (Harvard Economic Studies, Vol. LIV; Harvard University Press; 1937), Figure 33, p. 161. The figure cited is a map showing milk price relationships existing in the Northeastern United States in 1929. The map reveals a significant price difference in favor of producers located in southern, as against those located in northern, New England. On the next page (p. 162) of his prize winning study, Cassels, then an Assistant Professor of Economics at Harvard, notes ". . . it should be observed that because they have evened out their production, and because of their strategic location from a marketing point of view, the nearby producers in the Boston Milkshed had obtained base ratings prior to 1929 which relieved them from bearing any share of the seasonal surplus created by the farmers to the north. Similar factors undoubtedly affect prices around other large metropolitan centers." The same map also appears in Black, *The Dairy Industry and the AAA* (1935), at p. 69. Professor Black's scholarly Brookings Institution study of the early history of the New Deal dairy programs includes a lengthy discussion (at pages 211-219) of the importance of making full allowance for nearby values in the distribution of milk proceeds among farmers in fluid milk markets.

(1st Cir., 1939), unambiguously approved the Secretary's use of nearby differentials in milk orders only a short time after enactment of the statutory language in issue in this case. The long acceptance of the Secretary's interpretation of the statute by the parties affected by his regulation of the New England markets further confirms the correctness of his understanding of the Congressional purposes.

2. *If the decision below is not reviewed by this court, the Secretary may be forced to abandon the Connecticut differential regardless of the outcome of Cranston* v. *Freeman.*

If the decision of the court below is permitted to stand without review by this court, even a holding by the United States Court of Appeals for the Second Circuit favorable to the Secretary in *Cranston* v. *Freeman* may not suffice to preserve the Connecticut differential. Indeed, the Secretary might in such circumstances terminate the Connecticut differential prior to final resolution of the *Cranston* case in the Second Circuit.

Herbert L. Forest, Director, Dairy Division, Consumer and Marketing Service, United States Department of Agriculture, in an affidavit filed at the commencement of the proceedings in this case, stated:

> "Should it eventually be determined that 'nearby' differentials should not be paid, then a completely new approach in an order to achieve orderly marketing in the area must be considered."[17]

Mr. Forest's concern for orderly market reflects the statutory command that the Secretary maintain orderly mar-

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[17] Affidavit of Herbert L. Forest, filed with the District Court on January 9, 1967, and transmitted to this Court as part of the original record.

keting in marketing areas regulated by him.[18] It is clear, therefore, that if *Zuber* is not reviewed by this court, the Secretary will be obliged to speedily determine, through hearings and other appropriate administrative procedures, how best to minimize whatever marketing disorders result from the decision of the Court of Appeals below. Such a review will inevitably entail a consideration of the economic interrelationships between the immediately affected Massachusetts-Rhode Island Order area, and the Connecticut marketing area adjoining it.[19] In the process of reviewing these interrelationships the Secretary will in all probability study the question of whether or not the Connecticut Order nearby differential should continue despite removal of a parallel provision from a contiguous market area order. Even assuming the continued economic viability of the differential when viewed from the standpoint of the Connecticut Order alone, his examination of the problem might lead him nonetheless to conclude that pricing inconsistencies between the two markets demanded elimination of the Connecticut Order differential. In fact, the Secretary would in all likelihood act quickly to end any such inconsistencies if they led to significant symptoms of disorderly or unstable marketing.

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[18] See 7 U.S.C. § 602, quoted *supra*, n. 13; cf. 7 U.S.C. § 608c (18), providing that the Secretary, where he finds such action to be "necessary on account of changed circumstances, . . . shall, after due notice and opportunity for hearing, make adjustments in (milk) . . . prices."

[19] The Massachusetts-Rhode Island Order fixes minimum prices for dairy farmers who deliver their milk to handlers selling milk in fluid form in the states of Massachusetts and Rhode Island. This includes dairy farmers whose farms are located in Massachusetts, Rhode Island, Connecticut, New York, Vermont, New Hampshire and Maine. The Connecticut Order fixes minimum prices for dairy farmers who deliver to handlers selling milk in fluid form in the state of Connecticut. This includes *other* dairy farmers whose farms are located in Connecticut, Massachusetts, New York and, at times, Vermont. In many instances farmers whose milk is priced under one order may in fact be neighbors of farmers whose milk is priced under the other.

In the event that the Secretary did, in the interests of orderly marketing, remove the Connecticut differential from the Connecticut Order in spite of decisions upholding the propriety of that differential by the United States District Court for the Northern District of New York, and possibly even by the United States Court of Appeals for the Second Circuit, the result would be most unfortunate and inequitable for the State's affected nearby producers.[20] The *Cranston* case would be rendered moot, and Connecticut producers, without the differential adjustment, would thereafter lose substantial amounts of money to their distant counterparts despite significant legal authority affirming their right to continue to receive those monies.

3. *The decision of the United States District Court for the Northern District of New York in Cranston* v. *Freeman demonstrates in detail the fundamentally erroneous nature of the construction of the statute reflected in the Zuber* v. *Allen opinion and thus the appropriateness of review by this court of the decision below.*

In numerous important respects, *Zuber* v. *Allen* and *Cranston* v. *Freeman* are directly at odds concerning the construction of the statutory language in issue in this case. In the name of an overly simplistic and historically unsubstantiated concept of price uniformity, the *Zuber* opinion sets forth a reading of the statute contrary of the understanding of a generation of students of the dairy industry. It reads a particularized and limited statutory provision

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[20] It is evident that a decision altogether adverse to the Secretary in *Cranston* would not present the legal and equitable issues raised here. At the same time, it is possible that an intermediate decision to some degree upholding the Secretary's authority, but remanding the case in part, would be rendered irrelevant, however appropriate and desirable such an outcome might be.

describing the mechanics of a market-wide pricing system as a sweeping prohibition of any consideration, by the Secretary in setting producer prices, of one of the basic elements necessarily involved in the economic operation of all milk markets. In the process, the *Zuber* court ignores the reasons of public policy which gave rise to the inclusion of the language in question in the statute and the views of the Department which participated in the original drafting of the statute and has since that time, for some thirty years, regulated milk markets throughout the Nation in accordance with its understanding of the meaning of the words of the statute. In contrast, the opinion of the court in *Cranston* v. *Freeman,* grounded in a full and detailed record, including extensive expert testimony and documentary evidence, persuasively demonstrates the error of each of the numerous and central misconceptions set forth in the *Zuber* opinion. Consequently, review of the decision below by this court and of the adequacy of the summary proceedings upon which it is based would seem most appropriate to *amicus curiae.*

The court below holds that the farm location differential in the Massachusetts-Rhode Island Order is improperly based on the Act's supposed prohibition of "consideration of the use to which the milk of a . . . class of producers is put, historically or potentially . . ."[21] Faced with an almost identical regulatory provision and a similar administrative rationale for it, the *Cranston* court looked to the specific language of the statute. It found that the farm location differential in the Connecticut order did not fall afoul of the statutory direction that producers receive uniform prices "irrespective of the uses made of such milk by the

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[21] *Zuber* v. *Allen,* App. 34a.

individual handler to whom it is delivered."[22] As the court noted, ". . . the differentials are paid on the basis of farm location. The use made of the milk by the handler is totally irrelevant."[23] Concluding that it involved no departure from the specific words of the statute, which nowhere contains reference to general patterns of historical or potential use of the milk of classes of producers, the *Cranston* court adopted the construction of the Act which the Secretary has followed for some three decades, stating:

> ". . . the Court . . . cannot concur in the Court of Appeals' conclusion that the (uniform price) requirement prohibits recognition of the historic fact that farmers located in particular areas near the market were accorded a greater share of that market."[24]

The *Cranston* opinion is not, however, grounded solely in the words of the statute. It looks as well to the purpose behind those words and in doing so relies upon both their historical origins and judicial precedent interpreting them. The court points out that the "irrespective of the uses" language was intended to avoid destructive competition among producers for the fluid milk market, citing this court's decision in the case of *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U. S. 76, at 79 (1962).[25] If producer prices were differentiated on the basis of milk use in each individual case, handlers could then utilize destructive competition to their benefit and the detriment of all producers, precisely as they did prior to the introduction of governmental regulation of the milk markets. Taking into account this historical background the *Cranston*

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[22] 7 U.S.C. § 608c(5)(B), App. 4a; *Cranston* v. *Freeman*, App. 87a-93a.

[23] *Cranston* v. *Freeman*, App. 92a; cf App. 88a.

[24] *Cranston* v. *Freeman*, App. 118a.

[25] *Cranston* v. *Freeman*, App. 88a.

court concludes that farm location differentials "do not in any manner stimulate" the competition which the statute attempts to prevent and thus are not outlawed by its terms.[26]

The opinion below suggests that price uniformity is the overriding purpose of the statute in issue. The *Cranston* court, again drawing on its thorough grounding in the relevant particulars of the historical background of Federal milk regulation, observes:

> "... as agreeable as the concept of price uniformity may be in the abstract, Congress quite obviously did not look upon price uniformity as an absolute rule or even as a goal in itself ..."[27]

Finally, the *Zuber* opinion rests on a reading of the statute which fails altogether to respect the expertise of the Secretary and the understanding of students and participants in the operation of the dairy industry as to the purposes of the legislation. The Court's approach, which appears to assume a willful disregard of the statute by the Secretary and by the vast majority of producers and their counsel over a period of some three decades, stands in stark contrast to the *Cranston* court's informed deference to the long administrative and public construction of the statute:

> "This fundamental continuity in the use of farm location differentials beginning in a period of attempted self-regulation and progressing through various stages of government regulation clearly suggests that Congress recognized the need for such differentials and intended to authorize them."

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[26] *Id.*

[27] *Cranston* v. *Freeman*, App. 87a.

"Certainly those people in the industry and government most intimately involved in drafting the regulatory language and in administering the resulting legislation believed that Congress intended to authorize farm location differentials and they continue to believe so. Their opinions cannot be ignored."[28]

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari of Frederick T. Zuber, et al. be granted.

Respectfully Submitted,

ROBERT K. KILLIAN
Attorney General of the State of Connecticut

MICHAEL J. SCANLON
Assistant Attorney General of the State of Connecticut

Amicus Curiae

January, 1968

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[28] *Cranston* v. *Freeman*, App. 103a-104a.